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ABSTRACT

The concepts of educational malpractice and educational accountability are emerging more frequently in educational literature and as the basis of court cases. Up until now, no suits charging educational malpractice have been successful, but observers predict that suits charging schools with negligence will be successful. One basis for the court's dismissal of Peter Doe v. San Francisco Unified School District was that no commonly accepted definition of correct educational practice has been devised, so that "malpractice" is impossible to define. The court in Ianello v. University of Bridgeport held that education is not a consumer service. In Donohue v. Copiague Union Free School District, it was found that no legal duty had been improperly performed. Student litigants in malpractice cases misrepresent themselves when they do not acknowledge that lack of achievement is at least partially dependent on the student. Parents too are guilty of misrepresentation when they do not acknowledge their own responsibility to be aware of their children's lack of achievement and to attempt to discuss problems with the school at an early date. Advocates of educational malpractice suits assume an overly simplistic view of education. Nevertheless, educators must make positive efforts to reform their schools and make them accountable to the public. (Author/JM)

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EDUCATIONAL MALPRACTICE AND INTENTIONAL STUDENT MISREPRESENTATION*

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EDUCATIONAL MALPRACTICE AND INTENTIONAL

STUDENT MISREPRESENTATION

> Education is the most important function of state and local governments. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity where the state has undertaken to provide, it is a right which must be made available to all on equal terms.[1]

Introduction

The concepts of accountability and malpractice is currently creating much favor within the educational community and have been termed "revolutionary." In view of this and recent lawsuits brought by students charging negligence and malpractice, many institutions inclusive of public school systems have become more cognizant of their duty to deliver satisfactory end products; namely, students able to function in todays complex society.

If one examines this society, there are replete reminders of how imperative it is that all children receive a quality education. Increasingly, students are being seen as the consumers of schooling, and like the consumers of other products, they may be expected to demand rights and satisfaction. Currently, some 37 states have adopted or are in the process of adopting some form of accountability legislation, which states, who is to be responsible, to whom, for what, on what basis, and by what means. Recently introduced in the United States Congress, by Representative Ronald Motti (D.-Ohio), was an amendment to an education bill designed

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[1]Brown v. Board of Education, 347 U.S. 483 (1954).

to establish a national testing program for the expressed purpose of awarding high school diplomas. Although many state legislatures have moved in this direction, court decisions may retard the implementation of these legislative mandates. By way of illustration, the California state legislature in 1971, passed the Stull Act (Assembly Bill 293) which states that the performance of all certificated personnel shall be evaluated every two years under a uniform, objective system of assessment developed by the respective school districts. The trend seems to be that the public is going to increase their efforts, of holding educators accountable in the discharge of their duty.

Further, if one looks at the continued demand for getting more and more from the tax dollar, in light of escalating school cost, and the effect of various political maneuvers, such as Proposition 13, the lawsuit approach to educational accountability is likely to increase in popularity.

As we close out the final phase of the 1970's, it is incumbent upon educators, to continuously rise to meet this challenge. For the education of our student learners is no less important than the education of ourselves.

The purpose of this paper is to provide a legal overview of the concept of malpractice, as applied to the field of education. More specifically, the writer will examine and discuss the responsibility student learners have in the learning process. Focus here is on intentional misrepresentation as an aspect of the student not cooperating in the instructional process.

Legal Basis and the Parent

The Constitutional basis for federal involvement in education is derived from a limited number of provisions:

1. Article I, Section 10, which forbids the impairment of contractual obligations, and the First, Fifth, and Fourteenth Amendments.

2. The First Amendment provides guarantees for the freedom of speech, religion, the press, assembly, and the right of petition.

3. The Fifth Amendment provides protection against self-incrimination and has been the basis for cases dealing with loyalty oaths.

4. The Fourteenth Amendment says that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S.; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The due process and equal protection clauses of the Fourteenth Amendment have become the two most important means used by federal courts to invalidate state laws and to overturn state decisions.[2]

School litigation in the 1950's and 1960's dealt preeminently with the problems of resource allocation and of access; opening the schoolhouse door. Doe v. San Francisco Unified School District and other educational malpractice cases raise novel legal questions about professional accountability for the consequences of the educational process. What professional obligations do schools legally have to their students? Are courts the proper forum in which to assess negligence in meeting those obligations? Where malpractice is proven, is the tort remedy of remuneration for damages appropriate for a court to award?[3]

In The Schools, the Courts, and the Public Interest by John C. Hogan, a review of the history of court actions in education was done and five

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[2]"Right to Education: A Constitutional Analysis," University of Cincinnati Law Review, 44 (January, 1976) at 755-805.

[3]David Abel, "Can a Student Sue the Schools for Educational Malpractice?" Harvard Education Review, 44 (November, 1974) at 432.

discernible stages were identified. The first period, prior to 1850 was one of "strict judicial laissez-faire" in which education was viewed primarily as a local matter and even state courts were reluctant to intervene. The second period, from 1850 to 1950, was identified as the "stage of state control" during which few cases reached the U.S. Supreme Court and "a body of case law developed at the state level which permitted, if not actually sanctioned, educational policies and practices that failed to meet federal constitutional standards and requirements. This period was followed by a "reformation stage" which continues today and is characterized by federal decisions which bring state-sanctioned policies and practices into conformity with constitutional provisions. Hogan notes that a concurrent stage, or fourth period, has been one of "education under supervision of the courts" in which the federal courts have taken on enforcement responsibilities to ascertain that the minimum reform standards for school administration and programs are implemented. Finally, he suggests the Supreme Court's decision in the Rodriguez[4] case can mark a fifth or new stage of "strict construction."[5]

In the past 50 years, parents have become aware of the range of choices possible in the method and style of education and have become increasingly dissatisfied with the apparent failure of the public school system to deliver sound education to its students. Todays parents no longer share a common set of goals, nor do they have as much confidence in the public school system. As a result, they seek judicial relief.

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[4]Rodriguez v. San Antonio Independent School District, 337 F. Supp. 280 (W.D. Tex. 1971), rev'd 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973).

[5]Ronald Campbell, Laverne Cunningham, Raphael Nystrand and Michael Usdan, The Organization and Control of American Schools, Columbus, Ohio: Charles E. Merrill Publishing Company, 1975, at 148.

Parents who attempt to influence the education process by court action, have four options: They can sue the school system for breach of a state constitution, statutory or common law duty, for breach of a federal statutory duty, for vindication of a federal constitutional right, or for a combination of these.

The public school system in America is a creature of the individual states. In every state but Connecticut, there is a provision in the state constitution for the establishment of a public school system. The state legislature has wide discretion to determine the character and structure of public education including the means of financing, the curricula, the qualifications, duties and compensation of teachers and other school personnel.

Suit under federal law is only a recent thing because until the 1960's, federal involvement in education was minimal. Federal legislation in the field of education was accelerated in 1964 when the War on Poverty began with the passage of the Economic Opportunity Act.[6]

The parent owes the child a duty to educate him, and second, the parent owes the State a duty to educate his child.[7]

Educational Malpractice

As it now stands, the lawsuit approach to educational accountability culminating in charges of educational malpractice, is seen to be increasing in popularity under the assumption that somehow the concept of educational failure is analogous to medical malpractice. By way of

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[6]47 U.S.C. 2701-2994 (1964).

[7]"Right to Education," at 804-806.

definition, accountability may be best defined as "a means of holding an individual or group responsible for a level of performance or accomplishment for specific goals."[8] If one looks at the historical use of the term malpractice, one sees that educators and physicians have much in common. Members of both professions are acknowledged to play an important role in society, and are viewed with growing distrust by the public. It has recently become clear that they have something else in common, with increasing frequency they are being sued for "malpractice." While the idea of suing a physician for malpractice is no longer novel, suing a school system for failing to educate a student properly is a new idea, and one that seems to be catching on.[9]

An educational malpractice case can be defined as a case of alleged professional negligence or a situation in which services rendered by a person or agency for the benefit of another, is considered less than what is generally expected of a person in that position, much like that sometimes charged against doctors. If a patient suffers because a doctor fails to diagnose, misdiagnoses or prescribes the wrong treatment for a disease, then the doctor is likely to be liable for the injuries suffered. The key to this analogy is that something akin to competence must be demonstrated before liability attaches. A doctor is not liable merely because his patient dies or the treatment did not work. So, too, with educational malpractice; just proving that Johnnie can't read would not

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[8]William C. Miller, "Accountability Demands Involvement," Education Digest, 38 (October, 1972) at 14.

[9]Joan C. Baratz and Jerry Hartle, "Malpractice in the Schools," Progressive, 41 (June, 1977) at 34.

be enough. On the other hand, the school could not avoid liability, simply by claiming that schools promise opportunities, not results.[10]

In order for an individual or school system to be found guilty of malpractice, some basic questions must be answered. To wit:[11]

1. Is the professional being charged, granted immunity by law from tort liability?
2. Did one owe a duty of care to another?
3. Did one fail to exercise that duty of care?
4. Was there an accident in which a person sustained injury?
5. Was the failure to exercise duty of care, the proximate cause of the injury?

The idea of educational malpractice represents a shift from educational inputs, such as money, to educational outputs, such as reading ability.[12] Beginning efforts by the plaintiffs in court, has met with relatively little success. However, it is envisioned that future litigation efforts will be, and various school publics, i.e., teachers, parents, students and school districts, could be held accountable.

The beginnings of this type of lawsuit date back to 1957, when a student, Roy G. Jacobsen, was sued by Columbia University for recovery of two notes totaling $1,049.50 and representing the balance owed in tuition by the student.[13] The defendant filed a novel countersuit alleg-

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[10]Stephen D. Sugarman, "If Johnnie Can't Read--Get Yourself a Lawyer," Learning, 2 (April, 1974) at 28.

[11]H. C. Hudgins, "Tort Liability," in The Yearbook of School Law - 1976, Philip K. Piele (ed.), Topeka: National Organization on Legal Problems of Education, 1976.

[12]Baratz and Hartle, at 34.

[13]Trustees of Columbia University v. Jacobsen, 31 N.J. 221, aff'd, 53 N.J. Super. 574, 148A 2d 63, aff'd 156A 2d 251 (1959) at 6.

ing false representation by the University through the wording of its brochures, catalogues, building inscriptions, and the addresses of its representatives, as to what it would teach. Jacobsen argued that the University was practicing deceit, and he charged the University with fraud.[14] The defendant's countersuit was based on 50 alleged violations. The defendant held that the University promised that it would teach him wisdom, truth, character, enlightenment, understanding, justice, liberty, honesty, courage, beauty, and similar virtues and qualities; and that it would develop the whole man, maturity, well-roundedness, objective thinking, and the like . . . .[15]

The court inquired into the charges and found the student's life style did not exactly fit the mold of the successful scholar. Following a rather successful freshman year at Dartmouth, the defendant entered Columbia University in the fall of 1951. He continued until the spring of 1954, but was not graduated because of a poor scholastic record. It seems that the defendant's interests had shifted frequently in college from civil engineering, to social work, to physics, and finally to English and Creative Writing. In college, he was critical of his teachers and his courses. In his last year, he only attended classes when he chose and he rejected the "regimen of examinations and term papers." Upon receiving notification from the Columbia University Dean of Students, concerning his non-attendance and poor work, the defendant replied with a lengthy letter stating that he "wanted to learn" but in his own way.

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[14] Id. at 64.

[15] Id. at 66, 67.

He hoped that Columbia University would be able to grant "freedom" to a student "who wants to become a literary artist."[16]

In ruling in favor of the University, the court stated that the defendant felt that a college was not the traditional "Mark Hopkins" at one end of a log and the student at the other, "but rather" his dream of a universal scholar cum philosopher cum humanitarian at one end of the school bench and the defendant at the other.[17] The court further held only by reading into the statements in the brochures, etc., the "imagined meaning" which the defendant attributes to them can one conclude (rather tenuously and quite insubstantially) that the University represented that it could teach wisdom, truth, justice, and the other 47 qualities set out in the counterclaim. In essence, the court felt that the defendant was unfairly judging Columbia University's educational system by "the shifting standards of his own fancy."[18] He had deliberately sought to place his own failure at Columbia University's door on the theory that the University had deliberately misrepresented that it taught wisdom.[19]

The idea of extending the concept of malpractice into the field of education in the public schools appeared in 1970. Stuart Sandow, executive director of the National Committee for Citizen's in Education, wrote an article on educational fraud in which he hypothesized a suit brought by a high school graduate who could only function at the second

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[16] Id. at 66, 67.

[17] Id. at 65.

[18] Id. at 67.

[19] Id.

grade level.[20] The prediction was that the suit would be brought within a period of five years. Three legal approaches for the case were thought possible: (1) the constitutional approach, (2) the traditional approach, and (3) the suit seeking a declarative injunction.[21] Each approach treats the matter in a slightly different vein.

The constitutional approach would claim the deprivation of a "right to education." An attempt would be made through the suit to impose an "absolute responsibility" for the "product of education" through the Due Process and Equal Protection Clause of the Fourteenth Amendment, and through analogs that appear in each of the constitutions of the various states.[22]

The second approach, the traditional would be an attempt to seek a remedy for an individual and would include the elements of negligence, misrepresentation of student progress on report cards, failure to carry out statutory duty, and breach of implied contract. This was the route eventually chosen for the challenge in the courts.

The third and final method or approach is the seeking of a declarative judgement. This type of suit will enable the court to make a declaration of the rights of a student, or to make a legal ruling which will serve as an opinion on the point of law involved.[23]

Five possible defenses were hypothesized which might be used by a school system, such as: (1) a court might rule that just as education

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[20]Baratz and Hartle, at 33.

[21]Gary Saretasky, "Strangely Significant Case of Peter Doe," Education Digest, 39 (September, 1973) at 22, 23.

[22]Id.

[23]Saretasky, Education Digest at 23.

was not a right explicitly stated in the Constitution, there is also no basis for saying that it is implicitly stated either; (2) a demurrer might be filed contending that even if the facts are true, they do not constitute sufficient reason to rule in favor of the plaintiff; (3) a claim of sovereign immunity might be made by the school system; (4) countersuit might be filed by the school system against parents and students to either deter the initiation of law suits or to mitigate the consequences of any litigation; and (5) a court might take no action at all on the suit brought.[24] In spite of these possible setbacks awaiting her, Susanne Martinez, a lawyer for the San Francisco Youth Law Center, filed the suit of Peter Doe v. San Francisco Unified School District.[25]

Peter Doe v. San Francisco Unified School District[26] alleges that a student was allowed to progress through twelve years of schooling only to emerge without the ability to pass an eighth grade test as specified in the California Education Code.[27] The student had never exhibited any learning problems, had regular attendance, and was not a discipline problem. The mother, inquired into her son's reading ability, was told by the school that her son was not much below the school's average.[28] Upon graduation, Doe had to seek special tutoring to gain sufficient reading skills to function in society. The suit sought damages totaling $500,000 and sought to extend the laws of negligence by creating a "duty of care"

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[24] Id

[25] Baratz and Hartle, at 33.

[26] Peter Doe v. San Francisco Unified School District, 60 Cal. App. 3d 814, app., 131 Cal. Rptr. 854 (1976).

[27] Id. at 856.

[28] Id. at 862.

for school boards to be certain that students attain basic academic skills.[29] The suit was dismissed by both the trial and Superior Courts on three grounds. First, the defendant failed to state the cause of action for the contention that there was negligence involved through misrepresentation. Under law to state cause of action for negligence against a public entity, every fact material must be pleased with particularity.[30] No specific cause of action for misrepresentation was made.[31] Second, it was felt that it was not in the public's best interest to raise this issue at all. To hold the school district accountable for a "duty of care" in the discharge of their academic functions would expose them to the tort claims of countless numbers of disaffected students and parents.[32] Third, since there exist no readily acceptable standards with regard to classroom methodology, what constitutes accepted practice in the science or art of pedagogy, cannot be settled. The term[33] "malpractice" with regard to it is indefineable. Finally, it was held that mere failure of educational achievement was not "injury" within the meaning of tort law.[34] The case was appealed to the California Supreme Court, but the court refused to hear the appeal.[35]

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[29]West's Annotated Government Code, 815.2 (a).

[30]Peter Doe v. San Francisco, loc. cit. at 855.

[31]Id. at 862.

[32]Id. at 861.

[33]Id. at 855.

[34]Id.

[35]Baratz and Hartle, at 33.

Other suits have been filed since Peter Doe, but none have met with any greater degree of success. In 1975, the case of Ianniello v. University of Bridgeport,[36] a student Irene Ianniello sued the University claiming that a required course in secondary education was "worthless." In June of 1977, the case was dismissed. The basic rationale was made on the grounds that education is not a consumer service. The judge further recommended that other judges stay away from even trying to decide what constitutes "educational quality." In another case, a student at George Washington University sued on the basis that her landscape architecture course was "pure junk" and that she had only been taught "how to trace someone else's blueprints."[37] The case was settled out of court.

In a similar case entitled Donohue v. Copiague Union Free School District,[38] the court found that no legal duty had been improperly performed resulting in the plaintiff's alleged injury. The allegation was that his needs were not evaluated and he lacked basic reading and writing skills. It was further found that he did achieve satisfactorially in several subjects and was not totally illiterate, although he had failed other subjects. It was also stated that the purpose of educational laws was to confer the benefits of free education on the public and those benefits were not enacted to protect against any "injury of ignorance. Subsequently, the law of torts is inapplicable . . . ." The suit was properly dismissed.

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[36]Chronicle of Higher Education, (November 24, 1975).

[37]Baratz and Hartle, at 34.

[38]408 N.Y.S. 2d 584 (Sup. Ct. 1977), aff'd, 407 N.Y.S. 2d 874 (App. Div. 1978).

In Frederick v. Thomas,[39] a civil rights suit was filed alleging that children with specific learning disabilities were discriminated against because of failure of the defendants to provide instruction specifically suited to such children's handicaps. The thrust was to seek relief from improper "classification" under the Equal Protection Clause of the Fourteenth Amendment. Discrimination was also addressed in Lau v. Nichols,[40] in which a class action suit was brought by the parents of Chinese children against the San Francisco Unified School District. The parents won their rights to bilingual education under the Civil Rights Act of 1964, Title VI (Section 601), banning discrimination on the basis of "race, color, or national origin," by schools receiving federal monies. Additional Health, Education, and Welfare (HEW) Department guidelines, require instruction for the correction of language deficiencies, which the San Francisco Public Schools agreed to, upon receipt of the federal funds.

The courts have become an increasingly important vehicle for those who want to reform American education. In recent years, various lawsuits have been filed addressing the responsibility of a school system to provide equal opportunity and to ensure that the constitutional rights of students are not violated in the educational process. While such suits are based primarily on constitutional issues, the education malpractice suits are based on common law. They maintain that the school system should be held liable for damages if it fails to meet its statutory duty to provide a proper education to a particular student.

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[39]408 F. Supp. 832, 419 F. Supp. 960 (1976).

[40]414 U.S. 563, 94 S. Ct. 786, 39 L. Ed. 2d 1 (1974).

Although it is not the expressed purpose of this paper to discuss the minimum competency movement, it has been noted that this has been used as a means of addressing the malpractice issue. Most state legislatures have already made up their minds about how the movement will affect students in their respective states, but it is uncertain whether implementation efforts will effectively fulfill both the letter and the spirit of the state mandates.[41] Further research indicates that although minimum competency testing began at the high school level, it has sifted downward to lower grade levels. To date, some 16 states test for minimum competencies before grade seven, while others have local options about when testing should begin.[42] One clue as to how pervasive this issue might become, may be based on the outcome of Debra v. Turlington,[43] in the state of Florida, as well as Green v. Hunt,[44] a recent suit in North Carolina testing the constitutionality of their minimum competency test.

Educational malpractice cases have been decided on the theory of Tort Liability. In deciding if there should be liability in an action for failure to learn, the courts are deciding who should bear the educational "losses" caused by teacher negligence or incompetence. Some authorities suggest that losses should be assigned to the party better able to bear the costs, or should be shifted to the public at large.

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[41]Shirley Boes Neill, "A Summary of Issues in the Minimum Competency Movement," Phi Delta Kappan, 60 (February, 1979) at 452.

[42]Dorothy Levenson, "Minimum Competency Testing," Instructor, 60 (January, 1979) at 83.

[43]Education Daily, Vol. 11, No. 202 (October 18, 1978).

[44]Civil Action Number 78539C105, E.D.N.C., Education Daily, (December 4, 1978).

if a damage judgment would substantially reduce the quality of services that the school district could provide, courts will most likely decide that the social need for educational services outweighs the interest of any particular plaintiff or class of plaintiffs in recovering for educational benefits denied by teacher negligence.

A benefit of imposing liability on teachers, school officials, and school districts is a deterrence of negligent teaching and hiring of incompetent teachers. Personal liability may also discourage people from becoming teachers. There is virtually no law in the area of educational malpractice. However, the legal basis for this kind of action will be constructed from general principles of tort, contract law and mandamus.

Although educational malpractice has a seemingly short-lived judicial and statutory history, it is instructive to point out that with the many recent manifestations of the accountability movement, evidence suggest that it will only be a matter of time (five years or less), that a ruling will be made, supporting the charge of educational malpractice.

Malpractice and Misrepresentation

One outgrowth of the accountability movement in the United States has been the recent attempt to find suitable grounds for bringing a lawsuit alleging educational malpractice by school systems for failing to turn out finished products (also known as students) who can compete with other similar products in the adult market place. The full burden for this accountability has been placed squarely on the shoulders of the schools and their teachers. Meanwhile, the role of the child has seemingly been viewed as passive in the entire process. It is as though

teachers were supposed to function as did Charles Dickens' pedantic schoolmaster in Hard Times. Thomas Gradgrind, who viewed his charges as simply an "inclined plane of little vessels then and there arranged, ready to have imperial gallons of facts poured into them until they were full to the brim."[45]

This type of thinking represents an extremely short-sighted approach to accountability. Indeed, the students who have attempted to bring these lawsuits have often misrepresented themselves and their role in the educational process by assuming no responsibility to learn at all. Teachers are often at a loss to define the students' responsibility in learning and little has been written concerning this role.

In 1862, Professor John Grote attempted to explain the true role of the student in the learning process: "Success in teaching is a function of the recipient as well as the communicator; a good deal of failure of it there must always, and in every system of education, necessarily be."[46] The advocates of the educational malpractice suit assume, as in the older performance contracting concept, an overly simplistic view of education which denies complexity wherever it exists.[47] They imply that a school knows a great deal about individuals and how and when they learn most readily. They believe that a school can provide individualized expectations for every kind of performance that must be assessed.[48] No true

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[45]Charles Dickens, Hard Times, New York, Harper & Row, 1965, at 4.

[46]Alan A. Small, "Accountability in Victorian England," Phi Delta Kappan, LIII (March, 1972) at 439.

[47]Dave Darland, "Some Complexities of Accountability," Today's Education, 64 (January 21, 1975) at 21.

[48]Hulda Grobman, "Accountability for What?" Education Digest, 38 (October, 1972) at 20.

professional ever attempts to guarantee results, but only indicates anticipated results which are dependent on many conditions including methods, resources, environments, and the nature of the clients involved.[49]

Another common misrepresentation/misconception among those attempting to blame the schools for their failure to learn is that the schools provide all of the basis for a child's intellectual development and academic learning. Longitudinal studies of learning development by Benjamin Bloom, indicate that 50 percent of a child's intelligence is developed by age four, another 30 percent by age eight, and the remaining 20 percent by age 17. One-third of general learning growth, as based on achievement indices, takes place between birth and six, and another 17 percent between six and nine. The most important period for intellectual development and academic learning, therefore, occurs before age six.[50]

Parents and students often have unreasonable expectations with regards to the educational process. So much so that they do not even take the time to get involved in the process until it is too late. The Tenth Annual Gallup Poll of the Public's Attitudes Toward Public Schools showed that, on a nationwide basis, parents' lack of interest and pupils' lack of interest are tied for seventh place as being among the biggest problems facing education today.[51] Still, parents and students are now willing to sue to get what they consider to be their rights. Seemingly,

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[49]Darland, loc. cit. at 21.

[50]Allen C. Ornstein and Harriet Talmage, "Rhetoric and the Realities of Accountability," Today's Education, 62 (September, 1973) at 74.

[51]"What's Wrong With the Schools?" American Educator, Vol. 2, No. 4 (Winter, 1978) at 5.

they are even willing to misrepresent their part in the academic process to get what they want.

Part of the reason for fixing blame comes with an attempt to draw an analogy to medical malpractice in defining educational malpractice. No legal definition of educational malpractice now exists, but law journals have made attempts to clarify its meaning. The School Law Newsletter has characterized it as "improper, injurious, or negligent instruction and/or action which has a negative effect on a student's academic standing."[52] Some courts, however, have been willing to consider the college registration process as an implied contract and to recognize a college's catalog as a type of institutional advertising in order to allow charges of false advertising to be used as a basis for the charge of educational malpractice.[53] As mentioned in the aforementioned cases of Jacobsen and Peter Doe, clearly the misrepresentation was perpetrated only in the mind of the student offender, but it has been a common myth which has been perpetuated down to the present day, schools impart wisdom and students will gain it. If they do not, then the school alone is at fault.

Indeed, since these cases, the attempt to fix blame can only be intelligently done where there is a reasonable chance of finding evidence to support an accusation. Usually, the instruments of truth-finding are so weak and the existing situation so entangled that the assigning of blame becomes an irrational act.[54] Martin Burlingame feels that one way

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[52]Carol Barnes, "The Specter of Academic Malpractice," Change, 10 (May, 1978) at 10.

[53]Id.

[54]Martin Burlingame, "A Modest Proposal About Accountability," Educational Researcher, 7 (December, 1978) at 1.

around this problem is to adopt a middle ground policy, by emulating the automobile industry's no-fault argument. Under a no-fault posture, all parties would be compensated for losses suffered and research might be directed toward finding places to begin to attack the complex issues usually associated with any question involving accountability.[55]

Whatever the outcome of the attempts to legally define educational malpractice and accountability, the evidence is already apparent that students may not just arbitrarily or irresponsibly attack the schools without accepting at least part of the blame for their own shortcomings. Students have been guilty of misrepresentation in that they have not been totally honest, even with themselves, about their failure to identify their own shortcomings. People do not simply go through years of schooling to emerge suddenly aware that they cannot read a menu or fill out a simple application form. People are not insects which emerge from hibernation to find themselves completely changed and expected to take on completely new roles and responsibilities.

Education is an emergent process in itself. A continuous process of checks and balances in which the student is expected to be an active participant up to the limit of his/her abilities. Parents are also guilty of misrepresentation when they blame the schools for malpractice and at the same time, ignore their own child's education, to the extent that they did not express enough interest in their child to find out if (s)he could read a simple menu.

A little honest reflection on the part of those so eager to affix blame, may reveal the degree of alienation which has developed over the

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[55] Id. at 1-2.

years between the American public and the schools. A new era in education may ultimately emerge from this reflection and a redefinition of roles and responsibilities among parents, students, and the schools may be forthcoming. As in all things, patience on the part of all parties involved is a prerequisite for success.

Summary and Implications

The age of educator, student learner, and parent accountability is upon us. In 1970, President Nixon made accountability, the official educational philosophy when he stated: "School administrators and school teachers alike are responsible for their performance, and it is in their interest as well as in the interests of their pupils that they be held accountable." Admittedly the learning process, no less the role a student learner plays, is difficult to evaluate. It may be easier to find a doctor liable for a dead patient than a teacher responsible for a student not reading at grade level.[56]

If educational malpractice suits are successful they may cause school districts great monetary damage. The irony is that this money could be used for improving educational systems which in turn, might prevent the suits from occuring. These suits do have great significance toward the educator, and raises some thought provoking questions. Should (s)he be ridiculed or his/her reputation ruined as a result of the case? What constitutes compensable educational harm? Would the imprecision of available measuring tools render it impossible to evaluate a student's educational achievement? What is actually expected of the schools today?

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[56]Rennard Strickland and Janet F. and William R. Phillips, Avoiding Teacher Malpractice, New York: Hawthorn Books, Inc., 1976, at 256.

Education is an interactive process in which the child participates and is expected to indicate difficulty when he is experiencing it. Parents are also expected to be active participants. Thus, the question becomes, "How could either the parents of Donohue or Doe possibly fail to notice that their child could not read?"

The true key to success ultimately rests in the hands of those in charge, those individuals that administer educational programs. Educators must make positive efforts to reform their schools and make them accountable to the public. They must learn to budget their time more efficiently so that more of it may be devoted to supervision and the improvement of the quality of educational programs. Curriculum development and improvement must be a continuing process, no longer a "one-shot chore" to be forgotten amid the volumes of paper work until before the school's next periodic evaluation for certification. It is time that we, as educators and parents, either decide to stand up and fight for the system as we see it or resolve ourselves to be swept away by the winds of public opinion.[57]

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[57]Richard E. Fields and J. John Harris III, "Educational Malpractice and the Public Demand for Teacher Accountability," Planning and Changing, 8 (Spring, 1978) at 14.